

JAN 28 1997

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOE ALLEN JOHNSON,

Petitioner-Appellant,

v.

LARRY A. FIELDS, Director of the
Department of Corrections;
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Respondents-Appellees.

No. 96-5025
(D.C. No. 93-C-312-B)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before PORFILIO, BALDOCK, and HENRY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Joe Allen Johnson appeals from the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. Mr. Johnson was represented by counsel in the district court, but proceeds pro se on appeal. Mr. Johnson was convicted of murder in an Oklahoma court in 1962 and was given a life sentence. His conviction and sentence were upheld on appeal. Johnson v. State, 386 P.2d 336 (Okla. Crim. App. 1963). In denying the petition, the district court did not hold an evidentiary hearing nor make any factual findings. Our review of the district court's decision is de novo. Harvey v. Shillinger, 76 F.3d 1528, 1532 (10th Cir.), cert. denied, 117 S. Ct. 253 (1996).

On appeal, Mr. Johnson raises the same issues he raised in the district court: (1) that there was an improper variance between the charge of premeditated murder contained in the information and the charge of felony murder on which he was tried and convicted; (2) that admissions he made after he had been shot and while he was in the hospital under medication should not have been admitted into evidence; (3) that his counsel was constitutionally ineffective for failing to raise or adequately argue the first two issues and for failing to develop a misdemeanor-manslaughter theory of defense; (4) that the evidence was insufficient to convict him of murder; (5) that the trial court's failure to sustain his demurrer to the evidence denied him due process; and (6) that the trial court improperly instructed the jury on premeditated murder. He has also filed a

motion to supplement the record with evidence relating to the medication he received in the hospital. Because the district court record already contains that evidence, which was attached to Mr. Johnson's memorandum in support of an evidentiary hearing, the motion to supplement is DENIED as unnecessary.

We have fully considered Mr. Johnson's arguments and have reviewed the entire record, and we conclude that the district court did not make any reversible error. Therefore, the judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Bobby R. Baldock
Circuit Judge